office space. ILECs typically recover all costs associated with the conditioning of collocation space from the first CLEC to collocate, even though the space has been conditioned to serve many future collocators. As the NYPSC has recognized, this practice is anti-competitive and constitutes a barrier to entry. Intermedia, therefore, urges the Commission to adopt a national standard based on the approach used in New York, where ILECs are precluded from recovering the entire cost space conditioning from the initial CLEC who occupies a portion of a collocation area. The NYPSC has ruled that BANY may charge the initial collocator no more than its *pro rata* share of space preparation costs. In its order, the NYPSC noted:

> In order to remove [space reconditioning as a] competitive barrier to entry, BA-NY will be directed to pay for all special construction costs, except for the initial [telecommunications carrier's] proportionate share of such charges.... The need for special construction is likely to become more prevalent. Special construction will be a significant, routine cost for all [telecommunications carriers] and should thus be part of the basic floor space rate.[73]

Intermedia urges the Commission to adopt the cost recovery mechanism used in New York for collocation space conditioning costs, which permits ILECs to recover only the *pro rata* share of reconditioning costs from all collocators. Such a rule will eliminate a major entry barrier and avoid saddling CLECs with the added burden of acting as the ILECs' collection agent.

Furthermore, the Commission should not allow ILECs to assess unnecessary and hidden charges against collocating CLECs, such as charges for engineering reviews. The

---

73 New York Public Service Commission, *Order Directing Tariff Changes for Non-Price Terms and Conditions for Collocation*, Case No. 95-C-0657 *et al.* (Mar. 2, 1998).

experience of Intermedia in New York in illustrative in this respect. BANY's 914 intrastate Tariff[74] is larded with unnecessary costs. For example, BANY's 914 imposes unnecessary and duplicative engineering fees on each CLEC seeking to utilize the shared cage collocation arrangement, essentially requiring each party to pay for an engineering analysis of the same space. There is no reason an ILEC would need to conduct multiple site surveys to ascertain the availability of collocation space, cable racks, conduit and other support structures, power, for shared collocation arrangements. The only possible reason these actions would be necessary would be if the ILEC has failed to keep adequate records of its use of the space and support facilities that are used when collocation arrangements are established.

In defining minimum standards, Intermedia urges the Commission to prohibit individual-case-basis ("ICB") or to-be-determined ("TBD") pricing of collocation. ICB and TBD prices can unduly raise the cost of collocation by including numerous hidden charges, and alternatively, can lead to price discrimination.

V. INTERMEDIA SUPPORTS THE COMMISSION'S DEFINITION OF "UNBUNDLED LOCAL LOOP" AND URGES THE COMMISSION TO USE ITS EXISTING DEFINITION TO PROMOTE UNRESTRICTED COMPETITION IN THE PROVISION OF ADVANCED SERVICES

The Commission, through its existing definition of local loop, should adopt national minimum standards for unbundled loops that will ensure competitors the ability to provide advanced services.

---

74 New York Telephone Company's Proposed Revision to Tariffs P.S.C. No. 914 (July 23, 1998) ("BANY 914 Tariff");

A. Introduction

By the express terms of the Act, the Commission has broad authority to define UNEs. Indeed, as the Eighth Circuit Court of Appeals recently noted:

> Pursuant to section 251(d)(2) [of the Act], it is within the authority of the FCC to determine which of these network elements – *the facilities, the functions, or both* – incumbent LECs must make available on an unbundled basis.[75]

The Commission has used its power to define a number of UNEs, including the local loop, which the Commission defines as follows:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premise.[76]

Intermedia submits that the Commission should establish national standards for local loop unbundling to remove barriers to entry and to speed the deployment of advanced services.

In the *NPRM*, the Commission declared that "advanced services are telecommunications services, and that the facilities and equipment used to provide advanced services are network elements subject to the obligations in section 251(c)."[77] Intermedia strongly supports this conclusion regarding unbundled access to advanced services, and Intermedia similarly agrees with the Commission's ruling that it is technically feasible for ILECs to unbundle DSL-capable loops. Intermedia suggests that the Commission clarify that it is

---

75 *Shared Transport Decision*, 1998 US App LEXIS 18352, *21 (8th Cir. 1998) (emphasis added).

76 47 C.F.R. § 51.319

77 *NPRM* at ¶ 57.

technically feasible to unbundle loops provisioned over digital loop carrier ("DLC") equipment and that the same provisioning interval should apply for unbundling "home run" copper loops and DLC loops. Finally, the Commission should clarify rules for interconnection to subloop components and expressly find that collocation in remote terminals is technically feasible, necessary, and available under the Act.

B. The Commission Should Establish an Extended Link UNE

As discussed in Section IV, in New York, BANY has committed to permit CLECs to serve customers over EELs, which combine unbundled loops with transport, and multiplexing as necessary. Extended links permit CLECs to maximize the number of customers reached through a single collocation arrangement, and similarly maximize scarce collocation space in ILEC end offices, thus alleviating collocation space exhaustion problems that have resulted from the ILEC policy of requiring CLECs to collocate in every end office. There is only one shortcoming of the "EEL" approach as it currently exists in New York – the EEL is characterized as a combination of discrete UNEs that is being offered by BANY on a voluntary basis. In light of the decision by the Eighth Circuit Court of Appeals that ILECs cannot be compelled to combine UNEs, there is a danger that an ILEC offering extended link arrangements could unilaterally decide to withdraw them. In order to avoid this problem, and given The advantages presented by the extended link, Intermedia respectfully requests that the Commission define the extended link as a single UNE. The Commission is fully empowered to incorporate a series of discrete functions that are themselves defined as UNEs.

For example, many state commissions have required ILECs to provide subloop elements – the network interface device, distribution plant, concentrating equipment, and feeder plant – are offered as four discrete UNEs. At the same time, the combination of these four functionalities is also provided as a single unbundled local loop UNE. Using its uncontested authority to define UNEs, the Commission is fully empowered to define as a new UNE a similar combination of loop, central office multiplexing and interoffice transport functionalities.

The Commission has clear legal authority to define UNEs by function, including an extended link UNE, and the Eighth Circuit Court of Appeals' recent *Shared Transport Decision* supports this view.[78] In the *Shared Transport Decision*, the court noted that the statutory definition of network element[79] expressly "includes both individual network facilities and the functions which those facilities provide, either *individually or in consort*,"[80] and that, as presented, the shared transport UNE did not eliminate the distinction between unbundled access and resale.[81]

---

78 *Southwestern Bell Telephone et. al v. FCC et. al*, 1998 US App. LEXIS 18352 (8th Cir. 1998) ("*Shared Transport Decision*"). In the *Shared Transport Decision*, several ILECs challenged the FCC's shared transport UNE on grounds that: (1) the FCC has "no power to aggregate" ILEC transmission facilities into "a single network element"; and (2) the FCC's shared transport UNE was so broadly defined that it obliterated any meaningful distinction between unbundled access to UNEs (section 251(c)(3)) and total service resale (section 251(c)(4)). The Eighth Circuit rejected both of these arguments.

79 47 U.S.C. § 153(29).

80 *Shared Transport Decision* at 18352.

81 *Id.* Note, however, that the court left open the question of whether the pricing of shared transport could effect its status as a viable network element. The LECs argued that minute-of-use pricing for shared transport would unlawfully "obliterate" the distinction between UNEs and resale. Noting that state commissions have UNE pricing responsibility, the court declined to address this issue, stating that it "could do no more than conjecture as to whether the unbundled sale of transport will erode the careful distinctions between resale and unbundled access."

An extended link UNE would maintain a clear distinction between unbundled access under § 251(c)(3) and resale under § 251(c)(4), as purchasers of extended links would provide their own switching. An extended link UNE would therefore meet the requirements of the plain language of the Act and recent federal appellate court case law. The Commission should feel confident that it has the authority – and the need – to define an extended link UNE for all telecommunications services, including advanced services.

Finally, assuming that the Commission does endorse an extended link UNE – which is clearly within its authority – the Commission should state unequivocally that ILECs must make extended links available to CLECs at all levels of service. For the extended link to become a truly effective UNE, CLECs must have the ability to purchase extended links for all types of loops and all types of transport (copper and fiber). The Communications Act is technology neutral, and this Commission should not permit the ILECs to limit the ability of CLECs to use UNEs to provide any telecommunications service.

C. Operations Support Systems Issues

The Commission should clarify that CLECs should have complete access to ILEC OSS databases that contain information on whether loops have been conditioned for provisioning advanced services. Intermedia understands that ILECs are now in the process of establishing databases that identify loops that have been conditioned to carry advanced digital services. As the Commission has noted, "an incumbent LEC does not meet the [OSS] nondiscrimination requirement if it has the capability electronically to identify xDSL-capable loops, either on an

individual basis or for an entire central office, while competing providers are relegated to a slower and more cumbersome process to obtain that information."[82]

The Commission should require ILECs to provide specific information regarding the current state of ILEC loop databases, when these databases will be completed, and how they intend to provide CLECs with OSS access. As for accessing these database, the Commission should prohibit ILECs from imposing excessive charges on CLECs for identifying DSL-capable loops. Intermedia has been informed that some ILECs will require the dispatch of engineers for every loop that CLECs seek information on. Such charges can run into hundreds of dollars, just to determine if the loop is DSL-capable, and dispatching engineers results in unreasonable delay. Indeed, if the ILECs maintained adequate records, this information would be readily available. Finally, the Commission should clarify that an ILEC not impose nonrecurring charges on CLECs to determine if a loop is DSL capable unless similar nonrecurring charges are assessed on the ILEC's end user customers that order ADSL and other advanced services.[83]

---

82 *NPRM* at ¶ 56.

83 Significantly, in the ADSL tariffs recently filed with the Commission by BellSouth, Pacific Bell, U S WEST and Bell Atlantic, no ILEC showed a nonrecurring charge for inspections to determine whether existing loops to a customer premises were DSL-capable.

D. Use Of The Commission's Complaint Process To Resolve Loop Disputes

Intermedia supports the Commission's statement that the "rocket docket" process[84] should be available to CLECs that cannot obtain nondiscriminatory access to xDSL-capable loops, or any other loop capabilities to which they are entitled under § 251(c)(3) and the *Local Competition Order*.[85] Intermedia does suggest, however, that the Commission declare expressly the full range of relief that is available to CLECs through rocket docket proceedings and also clarify when it is appropriate for a petitioner to go to the Commission or to a state commission for relief. For example, Intermedia notes that not a single ILEC has complied with the Commission's order to develop nondiscriminatory OSS interfaces by January 1, 1997.[86] However, it is unclear whether a competitor should pursue OSS parity complaints through state commissions or through this Commission. If a Commission proceeding is appropriate, then the Commission should clarify what relief is available to petitioners with OSS complaints.

---

84 *Implementation of the Telecommunications Act of 1996 – Amendment of Rules Governing Procedures to be followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, Second Report and Order* (rel. Jul. 14, 1998).

85 *NPRM* at ¶ 157.

86 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Order on Reconsideration*, CC Docket No. 96-98 at ¶ 2.

E. Interference Issues

The Commission correctly notes that loop spectrum management will become an increasingly important issue with the proliferation of advanced services. Intermedia generally supports the adoption by the Commission of national standards on spectrum management, and supports the Commission suggestion that the spectral management requirements should apply equally to both ILECs and CLECs.[87]

While Intermedia supports national standards, Intermedia opposes the suggested riparian rights approach to spectrum management.[88] Under the riparian rights approach, existing users of loop spectrum essentially would have a right to prevent others from deploying technology that could cause interference. Rather than adopt a riparian rights approach, Intermedia submits that the Commission should convene a technical conference or similar collaborative process to explore the issues associated with spectrum management and develop an industry recommendation. Intermedia has found the collaborative approaches used in New York and Texas to be very conducive to resolving similar issues, and Intermedia feels that the Commission could benefit by employing a similar type of proceeding.

F. Defining a Standardized Set Of Loops For Advanced Services

As stated above, Intermedia supports maintaining the Commission's current broad definition of "unbundled loops," but the Commission should use this proceeding to clarify that, at a minimum, all ILECs must make available a core group of standard loops that are necessary to the provision of advanced services. Essentially, the Commission should require that all ILECs provide four basic forms of loops:

- Two-wire analog
- Two-wire digital
- Four-wire analog
- Four-wire digital[89]

These four basic loop types form the foundation for all telecommunications services, advanced and otherwise, incumbent and competitive, and these should be ubiquitously available across the country.

Technically, there is only one distinction between the analog and digital loops listed above – digital loops typically require conditioning (which includes the removal of bridged taps and loading coils) before they are capable of transmitting advanced digital services. To date, a number of ILECs have offered an expansive number of loops (including DS1, ADSL, HDSL, and BRI ISDN), but frequently, such simple elements as a digitally conditioned, four-

---

89 The importance of digital loops – *i.e.*, loops that have been conditioned to carry services generated over DSL and other advanced technologies – cannot be overstated. These are the loops that eventually will carry the bulk of the voice as well as the data traffic in the United States.

wire loop are not available. The inability of CLECs to obtain such loops is enormously frustrating, because simple digital two- and four-wire loops are the fundamental element over which a wide variety of services – including DS1, xDSL and ISDN – are provisioned.

The need for uniform national standards for loops is readily apparent upon reviewing selections from the Statements of Generally Available Terms and Conditions ("SGATC") filed by several ILECs. Intermedia appends as Attachment E excerpts from the SGATCs of several BellSouth states, and Bell-Atlantic-Virginia, which show the unbundled loops that these carriers offer. The BellSouth Georgia SGATC purports to offer nine different varieties of unbundled loops, including 56 kbps, DS1, ADSL, HDSL, DS3, BRI ISDN and PRI ISDN loops. In contrast, the SGATC of Bell Atlantic-Virginia in Virginia, lists only two-wire analog, ISDN, DS1, and two-wire customer specified signaling.

Moreover, the pricing for such loops varies wildly from ILEC to ILEC. These variations are in part due to the way the loops are defined. The BellSouth SGATCs provide a significant example. Intermedia appends at Attachment F a spreadsheet showing the relative rates for the various loops that are defined in SGATCs and interconnection agreements in a number of states. As the Attachment F illustrates, the rates for a DS1 loop range from $64.19 in Alabama to $80.00 in Florida, while the rates for a BRI ISDN line range from $25.93 in Georgia to $40.00 in Florida. The wide variety of loop definitions and highly disparate rates in the BellSouth SGATCs is particularly troubling in light of the fact that BellSouth contends that it does not provide *any electronics* with its digital loops, but rather simply hands conditioned

copper over to the CLEC.[90] BellSouth's pricing position begs the question: if the ILEC is not providing electronics with the loop, why has it defined seven different varieties of loops, all with different capacities and rates?

The confused and inconsistent variety of digital loops made available by the different ILECs illustrates the compelling need for the Commission to establish national standards. In particular, Intermedia asks that the Commission use its authority to define UNEs to do the following:

1. Require all ILECs to offer, at a minimum, analog and digitally conditioned two- and four- wire loops.

2. Require that the costs of conditioning digitally-capable loops be recovered through a one-time nonrecurring charge. This will result in four basic loops, with the following pricing configuration:

   - two-wire analog, at recurring rates set by state regulator
   - two-wire digital, at analog recurring rate set by state regulator, plus a nonrecurring charge for conditioning that is set by state regulator, or in the absence of state action, by the Commission
   - four-wire analog, at recurring rates set by state regulator
   - four-wire digital, at analog recurring rates set by state regulator, plus nonrecurring charge for conditioning that is set by state regulator, or in the absence of state action, by the Commission

3. Require ILECs to fully describe the circumstances in which they provide electronics with loops they define as 56 kbps, DS1, DS3, ADSL, HDSL, BRI

---

[90] Testimony of Alphonso J. Varner, Tennessee Regulatory Authority, Docket No. 97-00309 at pp. 270-71. Attached hereto as Attachment G ("Varner Testimony"). Mr. Varner noted: "If you look at DS1, we have a DS1 loop. It doesn't have any of the equipment associated with it .... The loop has the characteristics or the capabilities to provide the service, but it doesn't include the electronics. It's just the loop. It's an unbundled element."

> ISDN or PRI ISDN. If electronics are not being provided with the loops, the ILECs should be prohibited from charging more than the basic two- or four-wire digital loop rate.

By taking this action, the Commission would ensure that CLECs will be assured of obtaining the fundamental digital loops they require, and will eliminate the unacceptable confusion and uncertainty that has grown up around ILEC digital loop offerings to date.

G. Issues Relating To Loops Provisioned Over Remote Concentration Devices

It is widely reported that approximately 30 percent of customers nationwide are currently served by loops provided over digital loop carrier or similar remote concentration devices.[91] Given the pervasiveness of this technology, the Commission correctly notes that the use of DLC and similar technology to aggregate traffic at a remote terminals raises substantial technical questions that must be addressed in this proceeding.[92] Intermedia supports the Commission's conclusion that ILECs are required "to unbundle high-speed data-compatible loops whether or not a remote concentration device like a digital loop carrier is in place on the loop."[93]

Intermedia submits that by requiring ILECs to provide unbundled loops – regardless of the remote device used – is the best means by which the Commission can encourage ILECs to deploy DLC and other remote equipment that is compatible with the ILECs'

---

91 *See e.g.*, Sassan Babaie, "RAM-ing through xDSL Deployment," *America's Network*, (Sep. 22, 1998), available at www.americasnetwork.com.

92 *NPRM* at ¶¶ 169-71.

93 *NPRM* at ¶ 167.

unbundling obligations. As Intermedia understands it, three basic types of DLC equipment exist – universal DLC ("UDLC"), integrated DLC ("IDLC"), and next-generation DLC ("NGDLC"). Intermedia also understands that CLECs can readily provide unbundled loops provisioned by UDLC and NGDLC equipment; however, IDLC equipment poses unique challenges because IDLCs terminate directly into the ILEC switch, rather than at an intermediate distribution frame.

Intermedia does not ask the Commission to force ILECs to deploy UDLC or NGDLC. However, ILECs should not be able to evade their obligation to provide unbundled loops – and should not be allowed to impose additional costs on CLECs for such loops – by choosing to deploy IDLC. Intermedia therefore suggests that the Commission promulgate two options for ILECs to provide CLECs unbundled loops to customer locations served over IDLC equipment. First, the ILECs should have the option of de-multiplexing the IDLC feeder plant into discrete loops before entering the ILEC switch. Because this is a network engineering choice for the ILECs, they should not be allowed to increase their loop rates if they choose this option. Second, the ILECs should have the option of permitting CLECs to pick up loops on the trunk side of the switch. Here, the ILEC switch would act as a multiplexer – no switching functionality would be provided – and thus, under this option, the Commission should expressly state that ILECs may not charge for unbundled switching, when loops are provisioned in this way.[94]

---

[94] BellSouth indicates that next generation DLCs would result in a price increase. Testimony of Alphonso J. Varner, Tennessee Regulatory Authority, Docket No. 97-00309 at pp. 270-71. Attached hereto as Attachment H.

H. The Commission Should Require Sub-Loop Unbundling

Intermedia supports the Commission's tentative conclusion that CLECs should have access to sub-loop elements through collocating in controlled environmental vaults and equipment huts.[95] Intermedia suggests that access to physical collocation space in these remote terminals should be made available on a first-come, first served basis.[96] In the case of space exhaust, virtual collocation should be made available, as is the case for central office collocation.

The Commission also should expressly state that ILECs must provide CLECs with nondiscriminatory access to ILEC rights-of-way for CLECs establishing their own facilities next to remote terminals. As local exchange carriers, ILECs are required to provide such access pursuant to other telecommunications providers pursuant to § 224 of the Act,[97] and Intermedia requests that the Commission clarify this ILEC obligation to avoid any uncertainty. While states (and, in some cases, local governments), often regulate the terms and conditions of access to rights-of-way, § 253(c) expressly provides that any such regulation must be applied on a "competitively neutral and nondiscriminatory basis." In order to follow this directive, any state or local regulation would seem to require that ILECs provide CLECs nondiscriminatory access

---

95 *NPRM* at ¶ 174.

96 Intermedia believes that ILEC advanced service affiliates should be precluded from collocating at remote terminals. In cases where collocation space is inherently limited – as in remote terminals – the ILEC affiliate could easily occupy most available space under a "first come, first served" system.

97 Section 224(a)(1) provides that "[t]he term utility means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, rights-of-way used, in whole or in part, for any wire communication."

to rights-of-way. Thus, any such assertion by the Commission would comport with the existing statutory framework.

Finally, the Commission should not permit ILECs to place any restrictions on the ability of CLECs to cross-connect to ILEC remote terminals for the purpose of interconnection, collocation, or access to sub-loop elements. As noted above, ILEC restrictions on cross-connection in the traditional central office physical collocation context have greatly limited the effectiveness of CLEC collocation. Thus, Intermedia requests that the Commission expressly state that ILECs may not place restrictions on the ability of CLECs to perform their own cross-connects between CLEC remote terminals and ILEC remote terminals, subject to NEBS standards.

I. Packet-Switch Unbundling Is Technically Feasible

In response to the Commission's inquiry regarding the feasibility of unbundling packet switches,[98] Intermedia submits that packet switching capability may indeed be unbundled. In fact, in its arbitration with Ameritech (discussed in Section III(B)(2), *supra*), Intermedia demonstrated that frame relay switches are capable of being unbundled for purposes of obtaining interconnection.

---

98 *NPRM* at ¶ 182.

VI. THE COMMISSION IS CORRECT IN CONCLUDING THAT ADVANCED SERVICES SOLD TO END USERS MUST BE MADE AVAILABLE FOR RESALE PURSUANT TO § 251(c)(4)

Intermedia strongly supports the Commission's tentative conclusion that advanced services provided to end users are subject to resale just like any other telecommunications service.[99] The plain language of the Act states that the ILECs' § 251(c)(4) resale obligation extends to "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Thus, the Commission's tentative conclusion clearly comports with the Act.

The Commission should similarly extend ILEC resale obligations to access services that are purchased by end users. Intermedia understands that the Commission up to this point has not required ILECs to resell exchange access services because the "vast majority" of purchasers of interstate access service are telecommunications providers, who are not permitted to purchase for their own use ILEC wholesale services.[100] However, the Commission did note that "end users do occasionally purchase some access services,"[101] and for these end users, the Commission should permit competitive carriers to resell exchange access services at the wholesale rates prescribed by state regulators. Any other result would violate the plain terms of the Act, which requires ILECs to resell all telecommunications services offered to end users.

---

99 *NPRM* at ¶¶ 188-89.

100 *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

101 *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

Requiring ILECs to resell all services supplied to end users – including advanced services and access services – is not only required by the plain terms of the Act, but also will actually speed ILEC capital recovery and reduce ILEC investment risk. By reselling services to CLECs at wholesale rates, the ILECs increase tremendously the size of the sales staff bringing a product to market, and every single CLEC sale benefits the ILECs by generating wholesale revenue. CLEC sales competition encourages CLECs and ILECs to offer new products to the broadest possible base of customers at the lowest possible price. As the number of customers subscribing to a service increases, the marginal cost of serving additional customers decreases, which results in lower prices for consumers. As prices fall, more customers will purchase these services, which increases ILEC revenue and speeds ILEC investment recovery. Thus, the incentive to invest should not be deterred by resale.

Intermedia also notes that ILECs have federal and state mechanisms available to ensure that the ILECs are able to recoup all network investment, including any investment in advanced technologies. For example, resale rates include ILEC profit and UNE prices are established using a risk-adjusted cost of capital. Moreover, if ILECs feel that they are receiving an inadequate compensation for their services, the ILECs are free to petition federal and state regulators for rate increases.

VII. THE COMMISSION SHOULD REITERATE THAT TELECOMMUNICATIONS CARRIERS MAY PURCHASE UNES PURSUANT TO SECTION § 251(c)(3) TO PROVIDE ANY TELECOMMUNICATIONS SERVICE – INCLUDING DEDICATED SERVICES AND ACCESS SERVICES

Intermedia strongly supports the Commission's conclusion that § 251(c)(3) requires ILECs to provide unbundled loops capable of transporting high-speed digital signals, such that CLECs will be able to provide advanced services over UNEs.[102] Intermedia does, however, request that the Commission reiterate that telecommunications service providers may purchase UNEs to provide any telecommunications service, including dedicated services and access services, and that any effort to restrict a telecommunications provider's access to UNEs violates the plain language of § 251(c) and the Commission's implementing rules.

In the *NPRM*, the Commission reaffirmed its finding that "section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC."[103] Similarly, as the Commission clarified in its rules:

> § 51.309 Use of unbundled network elements
>
> (a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

---

102 *NPRM* at ¶¶ 52-53.

103 *NPRM* at ¶ 53, quoting *Local Competition Order*, 11 FCC Rcd at 15691-98, ¶ 381.

> (b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange service to subscribers.
>
> (c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.[104]

Clearly, ILECs are obligated to provide all telecommunications providers access to UNEs to provide any telecommunications service – exchange, exchange access, switched, or dedicated.

In spite of the Commission's clarity, some ILECs continue to maintain that carriers may not purchase UNEs to provide dedicated service. In New York, for example, BANY, citing § 251(g), has maintained that the Act permits limitations on the use of UNEs.[105] The Commission, however, specifically rejected this ILEC claim in the *Local Competition Order*.[106] Similarly, BANY believes that it has the right to charge a retroactive Special Access Surcharge to carriers seeking to convert private line service to UNEs. BANY argues that a conversion of a private line to UNEs is "excellent evidence" that a private line previously was used to provide local exchange service, and thus, BANY argues, a Special Access Surcharge is

---

104 47 CFR § 51.309.

105 *See* Technical Conference Transcript in NY Case 98-C-0690, *Proceeding on the Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements,* (June 29-July 1, 1998).

106 *Local Competition Order* at ¶ 362 ("We believe [§ 251(g)] does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing UNEs."

appropriate.[107] Intermedia submits that such limitations on UNEs is contrary to the plain language of the Act and the Commission implementing rules.[108] Intermedia thus requests that the Commission reaffirm its conclusion that ILECs may take no action that limits the availability of telecommunications providers, such as CLECs, to access UNEs to provide *any* telecommunications service at cost-based rates.

VIII. IT IS NEITHER NECESSARY NOR APPROPRIATE TO PROVIDE LIMITED INTERLATA RELIEF TO BOCS AT THIS TIME

In the *NPRM*, the Commission requests comment on its authority to grant limited interLATA relief by either modifying LATA boundaries pursuant to § 3(25)(B) or by classifying a service as "incidental" pursuant to § 271(b)(3) of the Act.[109] Intermedia submits that while each of these provisions gives the Commission limited authority over LATA boundaries, this authority is to be narrowly construed and should not permit a Bell operating company ("BOC") to end-run its 271(c) obligations, which outline what a BOC must do prior to providing in-region interLATA services, including advanced services.

Section 3(25)(B) of the Act provides the Commission with substantive, albeit limited, authority to modify interLATA boundaries. In the past, the Commission has modified LATA boundaries pursuant to § 3(25)(B) in cases where the requested modification: (1) has been approved by the relevant state commission; (2) proposes only traditional POTS service; (3) demonstrates that the state commission found a sufficient community of interest to warrant the

---

107 *See* BANY 916 Tariff.

108 Intermedia also notes that frame relay circuits, unlike voice circuits, cannot "leak."

109 *NPRM* at ¶¶ 191-196.

boundary waiver; (4) documents through surveys and other means that a "community of interest" exists; and (5) involves a limited number of customers or access lines.[110]

Intermedia notes that the Commission has permitted one very limited exception to the above-mentioned test by permitting Southwestern Bell Telephone ("SWBT") to provide ISDN service across a single LATA boundary, and Intermedia believes that this Commission's order is reconcilable with the above-mentioned five-point test as a *de minimus* exception.[111] In the *SWBT ISDN* order, the Commission noted that the TXPUC had ordered SWBT to make available ISDN service to all customers in Texas. SWBT estimated that approximately 20 customers in the entire Hearne, Texas LATA would purchase ISDN, and that the cost of upgrading equipment in the Hearne LATA would cost SWBT over two million dollars. Incorporating the Hearne LATA into the Austin LATA would be similarly cost prohibitive, and this the Commission permitted SWBT to provide ISDN to the Hearne LATA through equipment in the Austin LATA. Intermedia suggests that the combination of the TXPUC order, the *de minimus* demand, and the high cost of upgrading facilities were the factors that led the Commission to approve this waiver.

While a *de minimus* exception may exist, Intermedia cautions the Commission that the plain language of § 3(25)(B) permits the Commission to "modify" – not eviscerate –

---

110 *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, CC Docket No 96-159, FCC 97-244 at ¶ 24 (rel. July 15, 1997).

111 *Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas,* Memorandum and Opinion Order, File No. NSD-LM-97-26 (rel. May 18, 1998) ("*SWBT ISDN Order*").

LATA boundaries. As the Supreme Court has noted, the Commission's authority to "modify" portions of the Communications Act means "moderate change" and not "basic and fundamental changes in the scheme created by [statute]."[112] The Commission's ability to modify a statutory requirement does not give the Commission license to embrace a "wholesale abandonment or elimination of a requirement."[113]

If, for example, another carrier were available or if more than a handful of customers purchased the ISDN service mentioned above, any Commission action to "modify" a LATA boundaries would undercut § 271's interLATA prohibition. In such an instance, relief under § 3(25)(B) would decidedly "eviscerate section 271 and circumvent the procompetitive incentives for opening the local market to competition Congress sought to achieve in enacting § 271 of the Act."[114] It follows, therefore, that the Commission should embrace a strong presumption that any BOC effort to obtain interLATA relief pursuant to § 3(25)(B) is an attempt to circumvent § 271 of the Act, and should thus be rejected.

Section 10 of the Act provides the Commission with its substantive forbearance authority. The express language of §10(d), however, states the Commission "may not forbear from applying the requirements of section 251(c) or section 271 ... until such sections have been fully implemented."[115] In commenting on its authority to forbear from applying §§ 251(c) and 271, the Commission has noted, "Congress did not provide us with the statutory authority to

---

112 *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225 (1994).

113 *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (DC Cir. 1985).

114 *Advanced Telecommunications Order* at ¶ 82.

115 47 U.S.C. § 160(d).

forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented."[116] Similarly, erasing LATA boundaries for data services "would be functionally the same as forbearing from section 271 for advanced services and would eviscerate section 271 for those services."[117] Thus, even if forbearance were an appropriate remedy, the Commission's § 10 forbearance authority does not permit it to forbear from enforcing LATA boundaries until §§ 251(c) and 271 have been fully implemented. The Commission must not forget that the BOCs have the power to eliminate their interLATA prohibition – they simply must fully implement the competitive checklist provided by Congress.

Intermedia also notes that while § 271(g) permits the BOCs to provide "incidental interLATA services," § 271(h) expressly states:

> Limitations. – The provisions of subsection (g) are intended to be narrowly construed.... The Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service rate payers or *competition* in any telecommunications market.[118]

Thus, prior to approving a BOC provision of incidental interLATA service, Congress directed the Commission to evaluate the competitive effects of such a BOC service. Intermedia suggests that to the extent any – even incidental – interLATA relief will reduce the BOCs' incentive to comply with the procompetitive provisions of the Act, the Commission should reject such BOC applications.

---

116 *Advanced Telecommunications Order* at ¶ 12.

117 *NPRM* at ¶ 18.

118 47 U.S.C. § 271(h) (emphasis added).

The BOCs have produced essentially no evidence that the interLATA restriction is preventing ILECs from providing advanced services. In fact, U S WEST announced ADSL service rollout is the most aggressive of any ILEC, in terms of geographic area and number of customers covered – as reported by U S WEST, it plans to make ADSL service available to 5.5 million customers throughout its 14 state territory. Obviously, this was in planning and development for years – long before any 706 pleadings were filed. U S WEST could have sought limited interLATA relief at any time, but did not because it was and remains unnecessary.

In fact, evidence recently brought before the Commission demonstrates that the interLATA restriction does not inhibit the provision of advanced services. On July 22, 1998, Bell Atlantic-West Virginia ("BA-WV") submitted a self-styled "emergency petition" declaring that interLATA facilities did not exist to transport high-capacity digital services out of West Virginia, making the state a "digital island" cut off from interconnecting with out-of-state Internet service providers and digital service carriers. BA-WV indicated that West Virginia universities would be unable to access other institutions due to a "bandwidth famine" that purportedly existed in the state. Thus, alleged BA-WV, this lack of facilities created a crisis that could only be resolved by eliminating the restriction on BA-WV's provision of in-region, interLATA services currently imposed by section 271 of the Communications Act.

As the record of the proceeding developed, however, it became clear that at least one large IXC did indeed have the needed facilities available, but neither BA-WV nor its